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9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 KIRK KEILHOLTZ and KOLLEEN
14 KEILHOLTZ for themselves and on behalf
of those similarly situated,

15 Plaintiffs,

16 v.

17 SUPERIOR FIREPLACE COMPANY;
18 LENNOX HEARTH PRODUCTS INC.;
LENNOX INTERNATIONAL INC. and
DOES 1 through 25, Inclusive,

19 Defendants.
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Case No. C 08-00836SI

**MOTION TO DISMISS UNDER FEDERAL
RULES OF CIVIL PROCEDURE 9(b) AND
12(B)(6); POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: August 11, 2008

Time: 9:00 a.m.

Location: Courtroom 10

Complaint Filed February 6, 2008

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on August 11, 2008, at 9:00 a.m. or as soon thereafter as the matter may be heard in Courtroom 10 of the United States District Court, Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California, that Defendants Lennox Hearth Products Inc. and Lennox International Inc. (“Defendants”) will move to dismiss the Complaint filed by Plaintiffs Kirk and Kolleen Keilholtz under Federal Rules of Civil Procedure 9(b) and 12(b)(6) on the following grounds:

1. Defendants move to dismiss the claims for (1) violation of California Business and Professions Code section 17200 (“UCL”), (2) violation of the Consumer Legal Remedies Act (“CLRA”), and (3) unjust enrichment, on the grounds that Plaintiffs have failed to plead the fraudulent misrepresentations and false advertisements alleged in their Complaint with particularity, as required by Federal Rule of Civil Procedure Rule 9(b).

2. Defendants move to dismiss the CLRA claim with prejudice on the grounds that Plaintiffs have not and cannot allege sufficient facts to demonstrate that they complied with the pre-lawsuit notice requirements of the CLRA.

3. Defendants move to dismiss the CLRA claim with prejudice on the grounds that Plaintiffs have not and cannot allege facts demonstrating that Defendants engaged in a “transaction” with a “consumer” as required by the CLRA.

4. Defendants move to dismiss with prejudice the UCL claim asserted by those class members who own a home in which a fireplace was installed more than four years ago on the grounds that such claim is barred by the statute of limitations.

5. Defendants move to dismiss with prejudice the CLRA and unjust enrichment claims asserted by those class members who own a home in which a fireplace was installed more than three years ago on the grounds that such claims are barred by the statute of limitations.

This Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof, all of the pleadings and papers on file in this matter, including all other motions filed concurrently herewith, and upon such oral or documentary evidence that may be presented at the hearing.

1 **POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS**

2 **I. INTRODUCTION**

3 Plaintiffs have brought a national class action alleging that Defendants failed to warn
4 Plaintiffs, and the class they purportedly represent, that gas fireplaces become hot during
5 operation and that contact with the glass-front of these fireplaces can result in a burn to the skin.
6 Not surprisingly, plaintiffs do not allege in this case that the class representatives or putative class
7 members have suffered physical injuries from the fireplaces due to the alleged failure to warn.
8 The reason, or course, is because reasonable individuals appreciate the obvious potential to be
9 injured by fire and fireplaces, and easily manage that risk, just as they manage the risk of drinking
10 hot beverages, or using stoves, ovens, and bar-b-ques, and, of more recent popularity, open gas
11 fire pits. As a result, although injuries from fireplaces certainly can and do occur, they are
12 exceedingly rare in relation the millions of fireplaces that have been in use throughout North
13 America for the past 400 years.

14 Recognizing that they cannot possibly assert traditional strict products liability claims
15 given the lack of any allegation of resulting injuries, Plaintiffs have instead cobbled together
16 claims based principally on inapplicable California statutes and common law, including: (1)
17 violation of California Business and Professions Code section 17200 (“UCL”); (2) violation of
18 the Consumer Legal Remedies Act (“CLRA”); and (3) unjust enrichment. Of course, these types
19 of claims also require proof of damages, and so Plaintiffs have alleged, and will ultimately have
20 to prove among other things, that they, as well as every person in the United States who owns a
21 fireplace, had no inkling that touching the glass front of a burning fireplace could cause injury,
22 and would not have purchased their homes had they known of the risk.

23 Plaintiffs attempt to bolster these thin allegations by claiming that Defendants also
24 misrepresented the risks associated with the fireplaces and issued false advertising about the
25 fireplaces. Plaintiffs have, however, failed to set forth the requisite specificity required for such
26 fraud claims under Federal Rule of Civil Procedure 9(b), and have also failed to identify a single
27 advertisement that Plaintiffs supposedly relied upon in deciding to purchase their homes. Instead,
28 Plaintiffs ignore their clear obligation and instead simply allege in a broad and conclusory manner

1 that Defendants concealed, omitted and misrepresented the risks and dangers of fireplace use,
2 without any reference to the particular misconduct that Plaintiffs believe induced them to
3 purchase their residences. For that reason alone, the Court must dismiss the Complaint, as the
4 allegations are not specific enough to give Defendants notice of the particular misconduct
5 underlying the claims.

6 There are other fundamental problems with the pleading as well. For example, Plaintiffs
7 have asserted a claim for unjust enrichment when no such independent cause of action exists
8 under California law. Additionally, Plaintiffs have asserted a CLRA claim for monetary
9 damages, yet Plaintiffs have not alleged facts demonstrating that they provided Defendants with
10 written notice at least thirty days before filing suit, as required by the CLRA. Nor can Plaintiffs
11 in good faith allege such facts because Plaintiffs chose to ignore the CLRA notice requirements
12 and prematurely file suit, in direct contravention of the purpose and intent of the Act to facilitate
13 pre-complaint settlement. For these reasons, both the unjust enrichment and the CLRA claims
14 should be dismissed without leave to amend.

15 The CLRA claim also suffers from another fatal defect. Plaintiffs have not alleged that
16 Defendants engaged in a “transaction” with an “individual” who purchased the fireplaces for
17 “personal, family, or household purposes,” as required by the clear and unambiguous language of
18 the Act. Rather, Plaintiffs allege that Defendants sold the fireplaces to construction companies,
19 who in turn, sold the fireplaces to Plaintiffs and other class members. Construction companies,
20 however, are not individuals who purchased the fireplaces for their own personal, family, or
21 household purposes. Therefore, Plaintiffs have not alleged that Defendants engaged in a
22 transaction, nor can Plaintiffs make such allegations because Defendants do not sell their products
23 to individuals for any of the specified purposes. For this additional reason, the Court should
24 dismiss the CLRA claim with prejudice.

25 Finally, and significantly, the vast majority of the class claims are barred by the statute of
26 limitations. Actions under the UCL must be commenced within four years, while CLRA and
27 unjust enrichment actions must be commenced within three years. Nevertheless, Plaintiffs have
28 asserted these claims on behalf of purported class members who purchased homes with fireplaces

1 installed over the past ten years. Although Plaintiffs attempt to circumvent this flaw in their
2 pleading with vague allegations that Defendants “concealed” that the glass doors to the fireplaces
3 become hot during operation, these cursory allegations are not sufficient to resurrect the tardy
4 class claims as neither the delayed discovery rule nor the fraudulent concealment doctrine are
5 applicable here. Therefore, the Court should dismiss with prejudice the stale UCL claims
6 asserted by those class members who had a fireplace installed more than four years ago, and
7 dismiss as well the untimely CLRA and unjust enrichment claims of those class members who
8 had fireplaces installed more than three years ago. Dismissal of these patently stale claims will
9 not only narrow issues, but also allow the parties to better focus their discovery efforts and bring
10 into focus certain class certification issues, which Defendants anticipate will be substantial.

11 **II. ISSUES TO BE DECIDED**

12 1. Whether Plaintiffs are required to plead their UCL, CLRA and unjust enrichment
13 claims with particularity under Federal Rule of Civil Procedure 9(b), and if so, whether Plaintiffs
14 have satisfied this heightened pleading standard.

15 2. Whether Plaintiffs have stated a claim for unjust enrichment.

16 3. Whether Plaintiffs have alleged sufficient facts to demonstrate compliance with
17 the pre-lawsuit notice requirements of the CLRA.

18 4. Whether under the CLRA, Plaintiffs must allege that Defendants engaged in a
19 “transaction” with an “individual” who purchased the fireplaces for “personal, family, or
20 household purposes,” and if so, whether Plaintiffs have alleged sufficient facts showing that
21 Defendants have engaged in such a transaction.

22 5. Whether the UCL claims asserted by class members who own a home in which a
23 fireplace was installed more than four years ago are barred by the statute of limitations.

24 6. Whether the CLRA and unjust enrichment claims asserted by class members who
25 own a home in which a fireplace was installed more than three years ago are barred by the statute
26 of limitations.

27 ///

28 ///

III. ALLEGATIONS IN THE COMPLAINT

Plaintiffs purport to represent a national class of “consumers” who own homes and other residential dwellings in which one or more Superior and Lennox brand single pane sealed glass front fireplaces (hereinafter “fireplaces”) have been installed within ten (10) years prior to the date of the filing of the Complaint. (Compl. ¶ 2-3, 7-8.) Plaintiffs, on behalf of the putative class members, assert claims for (1) violation of the California Business and Professions Code section 17200, otherwise known as the unfair completion law (“UCL”), (2) for violation of the Consumer Legal Remedies Act (“CLRA”), and (3) for unjust enrichment. (*Id.* ¶¶ 20-42.)

As the basis for these three claims, Plaintiffs allege that Defendants “concealed, suppressed, omitted and misrepresented” certain “risks, dangers, defects, and disadvantages” associated with the fireplaces. (*Id.* ¶ 1.) With respect to the alleged omissions, Plaintiffs assert Defendants “failed to disclose” that the glass-front of the fireplaces become hot during operation and that contact with the glass-front can result in a burn to the skin. (*Id.* ¶ 15.) With respect to the alleged misrepresentations, Plaintiffs appear to assert that Defendants “represented to consumers that [the] fireplaces were safe, of merchantable quality, and fit for their intended and reasonably foreseeable uses, and with sufficient protections and warnings regarding potential dangers and hazards....”¹ (*Id.* ¶ 14.) Finally, Plaintiffs allege that Defendants issued deceptive, untrue and/or misleading advertising about the fireplaces, however, they do not point to any specific advertising that they believe fits this description. (*See id.* ¶ 21-22.)

Plaintiffs allege that Defendants designed, manufactured and marketed the fireplaces for distribution and sale “with the specific intent and purpose that said fireplaces be installed by builders in residential homes and other dwellings throughout the state of California.” (*Id.* ¶ 14.) After the builders purchased and installed the glass-front fireplaces, Plaintiffs then allegedly “purchased and/or otherwise came to own” residences and other dwellings outfitted with these fireplaces. (*Id.* ¶ 16.) Plaintiffs assert they would not have purchased residences in which the

¹ Plaintiffs seem to allege that Defendants made these representations by simply placing the products into the market, rather than by making affirmative representations about the safety and merchantability of the products. Plaintiffs should be required to clarify these questionable allegations in their pleading. *See infra* Part IV.B.

1 fireplaces had been installed had Plaintiffs been aware of the misrepresentations, omissions, and
 2 false advertising by Defendants. (*Id.* ¶¶ 25, 31.)

3 Plaintiffs contend they and the putative class members “have and will continue to suffer
 4 injury” as a result of the alleged misrepresentations, omissions and false advertising because
 5 “each has expended money to purchase residences incorporating [the fireplaces] and have or will
 6 be caused to expend money to remove said fireplaces from the homes and other residences they
 7 purchased and own.” (*Id.* ¶ 32; *see also id.* ¶ 17 (stating that “the class lost money” because they
 8 “paid a readily ascertainable amount for the [fireplaces]” as a part of the price of their homes and
 9 they “have or will suffer further damage to the extent that said owners have or will incur the cost
 10 of replacing or retrofitting the [fireplaces]”). To remedy this alleged injury, Plaintiffs seek
 11 restitution, damages, attorney fees, punitive damages, penalties, interest, injunctive relief, and the
 12 imposition of a constructive trust over revenues received for the fireplaces. (*Id.* at pp. 12-13.)

13 IV. RULE 9(B) LEGAL ANALYSIS

14 A. Legal Standard

15 Plaintiffs have failed to meet the heightened pleading standards of Federal Rule of Civil
 16 Procedure 9(b). Under this rule, all averments of fraud must be plead with particularity. Fed. R.
 17 Civ. Proc. 9(b) (stating that “[i]n all averments of fraud or mistake, the circumstances constituting
 18 fraud or mistake shall be stated with particularity”). To plead fraud with particularity, a plaintiff
 19 must provide the particular facts going to the circumstances of the fraud, including the time,
 20 place, persons, statements made and an explanation of how or why such statements are false or
 21 misleading. *See Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989);
 22 *Stickrath v. Globalstar, Inc.*, 527 F. Supp. 2d 992, 997 (N.D. Cal. 2007). In other words, the
 23 fraud allegations “must be specific enough to give defendants notice of the particular misconduct
 24 which is alleged to constitute the fraud charged so that they can defend against the charge....”
 25 *Stickrath*, 527 F. Supp. 2d at 997 (quotation marks and citation omitted).

26 When a plaintiff asserts claims based on any type of fraudulent conduct, including
 27 misrepresentations or omissions, the plaintiff must satisfy the heightened pleading standard of
 28 Rule 9(b). *See, e.g., Stickrath*, 527 F. Supp. 2d at 997; *McCready v. American Honda Motor*

1 *Corporation*, 2006 WL 1708303, *5 (N.D. Cal. 2006). The pleading requirements of Rule 9(b)
 2 differ based on the extent of the fraudulent conduct alleged. When the plaintiff alleges “a unified
 3 course of fraudulent conduct” and relies “entirely on that course of conduct as the basis of a
 4 claim,” then the claim “sounds in fraud” and the pleading of that claim as a whole must satisfy the
 5 particularity requirement of Rule 9(b). *Stickrath*, 527 F. Supp. 2d at 997 (citing *Vess v. Ciba-*
 6 *Geigy Corp. USA*, 317 F.3d 1097, 1003-04 (9th Cir. 2003)). When the plaintiff chooses “not to
 7 allege a unified course of fraudulent conduct in support of a claim, but rather to allege some
 8 fraudulent and some non-fraudulent conduct,” only the allegations of fraud are subject to the Rule
 9 9(b) heightened pleading requirements. *Id.* (citing *Vess*, 317 F.3d at 1003-04).

10 **B. Plaintiffs Have Failed to Plead Their Claims with Particularity**

11 Each and every one of the claims asserted by Plaintiffs are based on the allegations that
 12 Defendants misrepresented, omitted or falsely advertised the risks associated with the fireplaces.
 13 (*See, e.g.*, Compl. ¶ 1 (alleging Defendants “concealed, suppressed, omitted and misrepresented
 14 the risks, dangers, defects, and disadvantages of the fireplaces”); *id.* ¶ 14-16 (alleging Defendants
 15 “represented to consumers that said fireplaces were safe, of merchantable quality, and fit for their
 16 intended and reasonably foreseeable uses” but that in fact, the fireplaces “are a dangerous and
 17 patently unsafe hazard”); *id.* ¶¶ 21-23, 29-30.) Consequently, all of the claims sound in fraud,
 18 meaning that each claim as a whole must satisfy the particularity requirements of Rule 9(b). *See*
 19 *Stickrath*, 527 F. Supp. 2d at 997 (holding that UCL and CLRA claims sounded in fraud because
 20 the plaintiffs alleged that the defendant had “failed to disclose material information about the
 21 quality of its service and also made affirmative misrepresentations about that quality”).

22 Here, Plaintiffs have not come close to satisfying the heightened pleading standards of
 23 Rule 9(b). Although Plaintiffs allege that Defendants made misrepresentations, they failed to
 24 describe these misrepresentations with the requisite detail, and omit critical information regarding
 25 the specific statements that were made, the time the statements were made, the place that the
 26 statements were made, and the persons who made them. (*See, e.g.*, Compl. ¶ 1 (alleging in a
 27 conclusory manner that Defendants “misrepresented the risks, dangers, defects, and disadvantages
 28 of the fireplaces” but failing to specify what precise misrepresentations were made, the time the

statements were made, the place that the statements were made, and the persons who made them); *id.* ¶¶ 14-15 (alleging Defendants “[mis]represented to consumers that said fireplaces were safe, of merchantable quality, and fit for their intended and reasonably foreseeable uses” but failing to specify who made these representations, when they were made, and where they were made). Plaintiffs also allege that Defendants issued false and misleading advertising, but again, they fail to give any particulars, such as what advertising they believe fits this description, the timeframe during which the advertising was distributed, the form or location of the advertising, etc. (*See id.* ¶ 21-22.) In fact, Plaintiffs have not even pointed to a single advertisement that allegedly induced them to purchase their homes.

Even when the Complaint is read in the light most favorable to Plaintiffs, the broad and conclusory allegations of misrepresentations and false advertising fall short of including the requisite supporting detail, leaving Defendants to guess what conduct Plaintiffs believe support their claims. *See Stickrath*, 527 F. Supp. 2d at 997 (explaining that fraud allegations “must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged”) (quotation marks and citation omitted). Accordingly, all of the claims in the Complaint should be dismissed for failing to plead fraud with particularity.

V. RULE 12(B) LEGAL ANALYSIS

A. Legal Standard for 12(b)(6) Motion

Plaintiffs have failed to allege cognizable legal theories and sufficient supporting facts making dismissal of their Complaint appropriate under Federal Rule of Civil Procedure 12(b)(6). Under this rule, a court must dismiss a complaint when a plaintiff has not plead a cognizable legal theory or plead sufficient facts to support a cognizable legal theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). For purposes of such a motion, the court must construe the complaint in the light most favorable to the plaintiff. *Everest & Jennings, Inc. v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). However, the court cannot assume that the plaintiffs can prove facts which have not been alleged. *Country Nat’l Bank v. Mayer*, 788 F. Supp. 1136, 1139 (E.D. Cal. 1992) (quoting *Associated Gen. Contractors v. Cal. State Council*, 459 U.S. 519, 526 (1983)). Additionally, the court need not accept as true allegations that are merely conclusory,

unwarranted deductions of fact, unreasonable inferences, or legal characterizations cast in the form of factual allegations. *See Spreewell v. Golden State Warriors*, 266 F.3d 979, 987 (9th Cir. 2001); *W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

B. Plaintiffs Cannot Maintain a Claim for Unjust Enrichment

Plaintiffs assert a cause of action for “unjust enrichment;” however, under California law, “[u]njust enrichment is not a cause of action...or even a remedy, but rather a general principle, underlying various legal doctrines and remedies.” *McBride v. Boughton*, 123 Cal. App. 4th 379, 387 (2004); *see also Melchior v. New Line Productions, Inc.*, 106 Cal. App. 4th 779, 794 (2003) (explaining that the phrase unjust enrichment “does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so”). As a result, a majority of the state and federal courts to consider the issue have refused to recognize an independent cause of action for unjust enrichment. *See, e.g., Melchior*, 106 Cal. App. 4th at 794 (stating “there is no cause of action in California for unjust enrichment”); *McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1490 (2006) (same); *Walker v. GEICO General Ins. Co.*, 2007 WL 499660, *4 (E.D. Cal. 2007) (same). Following this well-established line of authority, this Court should dismiss the unjust enrichment claim without leave to amend. *See Walker*, 2007 WL 499660, *4 (dismissing an unjust enrichment claim without leave to amend; reasoning that because “California law does not recognize [a] claim for unjust enrichment, there are no facts Plaintiff could prove to support this claim” and that therefore “the deficiencies of the complaint cannot be cured”).²

² Defendants note that a few courts appear to have recognized an unjust enrichment claim, but in these cases the plaintiffs were seeking restitution and had no other adequate remedies, *Falk v. General Motors Corp.*, 496 F. Supp. 2d 1088, 1099-1100 (N.D. Cal. 2007), or the plaintiffs had asserted unjust enrichment claims based on rights arising out of other law, *Walker v. GEICO General Ins. Co.*, 2007 WL 499660, *4 (E.D. Cal. 2005). Here, Plaintiffs have adequate remedies because they have asserted UCL and CLRA claims under which they seek to recover restitution and damages, respectively. *See Falk*, 496 F. Supp. 2d at 1099-1100 (dismissing an unjust enrichment claim because the plaintiffs had asserted claims under the CLRA and UCL, thereby negating the need for the plaintiffs to resort to an unjust enrichment theory). Additionally, Plaintiffs do not base their unjust enrichment claims on rights arising out of other laws, which also weighs in favor of dismissing the claim with prejudice. *See Walker*, 2007 WL 499660 at *4 (dismissing unjust enrichment claim because plaintiffs had not premised their claim on other laws).

1 **C. Plaintiffs Have Failed to Allege Sufficient Facts Demonstrating Compliance with the**
 2 **CLRA Notice Requirements**

3 Before a plaintiff may file a CLRA action seeking damages, that plaintiff must first
 4 comply with the notice requirements of Civil Code Section 1782. Specifically, at least thirty (30)
 5 days or more before commencement of a CLRA action for damages, the plaintiff must: (1) notify
 6 the person or corporation alleged to have employed or committed methods, acts, or practices
 7 declared unlawful by the CLRA of the particular alleged violations, and (2) demand that the
 8 person or company correct, repair, replace, or otherwise rectify the goods or services alleged to be
 9 in violation. Cal. Civ. Code § 1782(a). The notice must be placed in writing and sent by certified
 10 or registered mail, return receipt requested, to the place where the transaction occurred or to the
 11 corporate principal place of business. *Id.*

12 The CLRA notice requirements serve “to give the manufacturer or vendor sufficient
 13 notice of alleged defects to permit appropriate corrections or replacements,” and are designed “to
 14 provide and facilitate precomplaint settlements of consumer actions wherever possible and to
 15 establish a limited period during which such settlement may be accomplished.” *Outboard Marine*
 16 *Corp. v. Superior Court*, 52 Cal. App. 3d 30, 40-41 (1975). In light of these purposes, courts
 17 literally apply and strictly construe the notice requirements. *See id.*; *Cattie v. Wal-Mart Stores*
 18 *Inc.*, 504 F. Supp. 2d 939, 950 (S.D. Cal. 2007) (stating that “a claim for damages under the
 19 CLRA requires strict compliance with the notice requirements”).

20 As a result, to properly assert a CLRA claim, the plaintiff must allege specific facts
 21 demonstrating compliance with each of the CLRA notice requirements. *See Cattie*, 504 F. Supp.
 22 2d at 950 (stating that “compliance with this requirement is necessary to state a claim” and
 23 holding that failure to do so results in dismissal of a claim with prejudice) (citing *Outboard*
 24 *Marine*, 52 Cal. App. 3d at 40-41 (1975) (addressing failure to give CLRA notice under demurrer
 25 standard); *Laster v. T-Mobile United States, Inc.*, 407 F. Supp. 2d 1181, 1195-96 (S.D. Cal. 2005)
 26 (dismissing CLRA damages claim with prejudice under Rule 12(b)(6) for failing to comply with
 27 notice requirements); *Von Grabe v. Sprint*, 312 F. Supp. 2d 1285, 1304 (S.D. Cal. 2003)
 28 (dismissing premature CLRA damages claim with prejudice)). If the plaintiff fails to adequately

1 allege compliance, or if the allegations reveal that the plaintiff has not actually complied, the
 2 court must dismiss the claim. *See, e.g., Laster*, 407 F. Supp. 2d at 1195; *Cattie*, 504 F. Supp. 2d
 3 at 950; *Von Grabe*, 312 F. Supp. 2d at 1304.

4 Plaintiffs have not properly alleged compliance with the CLRA notice requirements.
 5 Although Plaintiffs allege in a conclusory manner that they have given notice to Defendants “in
 6 accordance with Cal. Civ. Code section 1780 [sic],” (Compl. ¶ 33), this legal conclusion cast in
 7 the form of a factual allegation should not be accepted as true for purposes of this Motion to
 8 Dismiss, *see Spreewell*, 266 F.3d at 987 (explaining that on a motion to dismiss the court need not
 9 accept as true allegations that are merely conclusory, unwarranted deductions of fact,
 10 unreasonable inferences, or legal characterizations cast in the form of factual allegations).³
 11 Plaintiffs have not alleged *when* they purportedly sent such notice, *how* such notice was sent, and
 12 *what* information that notice contained, all of which must be completed in a certain manner to
 13 comply with the CLRA. *See* Cal. Civ. Code § 1782(a). Accordingly, the Court should dismiss
 14 the CLRA claim to the extent Plaintiffs seek damages, given that they have failed to adequately
 15 allege compliance with the notice requirements.

16 Moreover, the Court should dismiss the CLRA damages claim without leave to amend
 17 because Plaintiffs cannot in good faith allege different or additional facts to cure the deficiencies
 18 in their Complaint.⁴ *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (the court may dismiss the
 19 complaint without leave to amend if “the plaintiff can prove no set of facts in support of his claim
 20 which would entitle him to relief”). Contrary to their conclusory allegations, Plaintiffs never

21 ³ The Court should be particularly suspicious of this conclusory allegation since Plaintiffs have not attached the
 22 notice to their pleading, as they alleged in their Complaint. (See Compl. ¶ 33 (stating that a copy of the notice has
 been attached to the Complaint as Exhibit A).)

23 ⁴ There is a split of authority regarding whether failure to adhere to the CLRA notice requirements should result in
 24 dismissal of a CLRA damages claim with or without prejudice. *Compare Cattie*, 504 F. Supp. 2d at 950 (dismissing
 25 CLRA claim with prejudice), and *Utility Consumers' Action Network v. Sprint Solutions, Inc.*, 2008 WL 1946859, *6
 (S.D. Cal. 2008) (same), with *Deitz v. Comcast Corp.*, 2006 WL 3782902, at *6 (N.D. Cal. 2006) (dismissing CLRA
 26 claim without prejudice). The case law dismissing claims with prejudice better comport with the spirit and intent of
 27 the CLRA and should therefore be followed here. *See Cattie*, 504 F. Supp. 2d at 950 (explaining that to permit a
 28 plaintiff “to seek damages first and then later, in the midst of a lawsuit, give notice and amend would destroy the
 notice requirement’s utility, and undermine the possibility of early settlement”); *Utility Consumers' Action Network*,
 2008 WL 1946859, at *6 (explaining that the “prefiling notice serves to avoid litigation, not to put additional
 pressure on a defendant during the course of litigation” and that defendants “should...be[] afforded the opportunity to
 attempt to resolve...issues before litigation...[is] instituted”).

provided Defendants with CLRA notice in connection with this national class-action lawsuit, and instead, chose charge ahead with the filing of their Complaint for damages, ignoring the clear purpose and intent of the CLRA to facilitate pre-complaint settlement. *See Cattie*, 504 F. Supp. 2d at 950; *Utility Consumers' Action Network*, 2008 WL 1946859, at *6. This is why Plaintiffs failed to attach Exhibit A to their Complaint -- because no such notice exists. Accordingly, the claim should be dismissed with prejudice.

D. Plaintiffs Have Failed to Allege Sufficient Facts to Support a CLRA Claim Because Plaintiffs Have Not Alleged Facts Demonstrating that Defendants Engaged in a "Transaction"

Generally speaking, the CLRA "proscribes certain unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer including '[u]sing deceptive representations...in connection with goods or services.'" *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 679-680 (2006) (quoting Civ. Code §1770(a)(4)); *see also Bescos v. Bank of America*, 105 Cal. App. 4th 378, 387 (2003). Importantly, and as explained below, a CLRA action can be asserted only against those defendants who sell goods or services directly to individuals who are natural persons. Here, because the Complaint alleges that Defendants sold fireplaces to homebuilders, who then sold homes containing fireplaces to individuals, the CLRA does not apply.

The key substantive provisions of the CLRA are located in California Civil Code sections 1770 and 1780. *See generally* Civ. Code §§ 1770-1780. Section 1780 authorizes an action by "[a]ny consumer who suffers any damage as a result of the use or employment by any person of a method, act or practice declared unlawful by Section 1770." *Id.* § 1780(a). In turn, Section 1770 declares unlawful twenty-three presumptively unfair methods of competition and unfair or deceptive acts or practices that are "undertaken by any person **in a transaction**..." *Id.* § 1770(a) (emphasis added); *cf. Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (explaining that the CLRA only applies to "a limited set of transactions").

The term "transaction" has been specifically defined by the CLRA as "an agreement between a **consumer** and any other **person**, whether or not the agreement is a contract

1 enforceable by action, and includes the making of, and performance pursuant to, that agreement.”
 2 Civ. Code § 1761(e) (emphasis added). The CLRA further defines “consumer” as “an **individual**
 3 who seeks or acquires, by purchase or lease, any goods or services for personal, family, or
 4 household purposes.” *Id.* §1761(d) (emphasis added). While the CLRA does not define
 5 “individual,” in light of the broader definition of “person,” which includes individuals, entities,
 6 associations and groups, common sense dictates that the term refers only to a natural person.⁵

7 Reading the substantive provisions of the CLRA together with the definitions provided
 8 under the Act, a clear and simple rule emerges. A plaintiff can bring a lawsuit against a
 9 defendant under the CLRA only if that defendant has engaged in unfair competition and/or unfair
 10 or deceptive acts as part of a “transaction.” *See* Civ. Code § 1770(a); *Ting*, 319 F.3d at 1148.
 11 According to the CLRA, a defendant engages in a “transaction” by entering into an agreement
 12 with an individual, i.e. a natural person, who purchases goods for personal, family, or household
 13 purposes. *Id.* §§ 1761, 1770, 1780.

14 Therefore, under the plain and unambiguous language of the CLRA, the Act only applies
 15 if the defendant has engaged in unfair competition and/or unfair or deceptive acts as part of an
 16 transaction with a natural person who purchases goods for personal, family, or household
 17 purposes. Accordingly, the CLRA does not apply to unfair or deceptive acts engaged in by a
 18 defendant as part of a transaction with non-natural persons, such as partnerships, corporations,
 19 limited liability companies, associations, or other groups, however organized. *Cf. Cal. Grocers*
 20 *Ass'n v. Bank of Am.*, 22 Cal. App. 4th 205 (1994) (holding that trade group was not “consumer”
 21 of services for personal, family, or household purposes). Nor does the CLRA apply to unfair or
 22 deceptive acts engaged in by a defendant with natural persons who do not buy or lease goods for
 23 personal, family, or household purposes. *Cf. id.*

24 Plaintiffs have not alleged any facts in their Complaint demonstrating that Defendants
 25 engaged in a “transaction.” More specifically, Plaintiffs have not alleged that Defendants entered
 26 into an agreement with an individual (a natural person) who purchased or leased the fireplaces for

27 ⁵ The CLRA defines “person” as “an **individual**, partnership, corporation, limited liability company, association, or
 28 other group, however organized.” Civ. Code §1761(c) (emphasis added).

1 personal, family, or household purposes. Rather, Plaintiffs allege that Defendants sold the glass-
 2 front fireplaces to construction companies, that these companies installed the glass front
 3 fireplaces into the homes, and that Plaintiffs then “purchased and/or otherwise came to own”
 4 residences and other dwellings outfitted with the fireplaces. (See Compl. ¶¶ 14, 16.) The alleged
 5 sale of the fireplaces by Defendants to construction companies cannot constitute a “transaction”
 6 under the CLRA because the companies are not “consumers,” as they are not natural persons and
 7 did not purchase the fireplaces for their own “personal, family, or household purposes.”

8 Consequently, Plaintiffs have not alleged that Defendants engaged in a “transaction.”
 9 Given that the plain and unambiguous language of the CLRA requires this transaction as a
 10 prerequisite to suit, the Court must dismiss that cause of action for failure to plead sufficient facts.
 11 See generally *Outboard Marine*, 52 Cal. App. 3d at 40 (explaining that a court cannot “disregard
 12 or enlarge the plain provisions of the [CLRA]” or “go beyond the meaning of the words used
 13 when they are clear and unambiguous” and instead must give “effect ... to its plain meaning”).
 14 Moreover, because Defendants do not sell their fireplaces to “individuals” who purchase the units
 15 for their own “personal, family, or household purposes,” Plaintiffs cannot in good faith allege
 16 different or additional facts to cure the deficiencies in their Complaint.⁶ Accordingly, the court
 17 should dismiss their CLRA claim without leave to amend. See *Conley*, 355 U.S. at 45-46.

18 **E. The Claims Asserted by Class Members Who Own Homes In Which Fireplaces**
 19 **Were Installed Over Three to Four Years Ago Are Barred by the Statute of**
 20 **Limitations**

21 Although Plaintiffs have asserted UCL, CLRA and unjust enrichment claims on behalf of
 22 purported class members who purchased homes with fireplaces installed over the past ten years,
 23 the statutes of limitation applicable to these claims impose significantly shorter filing periods.
 Specifically, under the UCL actions must be commenced “within four years after the cause of

24 ⁶ Defendant Lennox Hearth Products Inc. sells its fireplaces to distributors, who in turn sell the fireplaces to
 25 construction companies, who then sell houses containing the fireplaces. The sale of the fireplaces from Defendant to
 26 the distributors also does not constitute a transaction under the CLRA. The distributors that Defendant sold the
 fireplaces to are not individuals (natural persons) and did not purchase the fireplaces for their own personal, family,
 or household purposes.

27 Of course, these facts cannot be considered on the motion to dismiss because Plaintiffs did not allege these facts in
 28 their Complaint. However, the facts do demonstrate that Plaintiffs should not be granted leave to amend because
 they cannot in good faith allege a transaction between Defendants and any individual.

1 action accrued,” Cal. Bus. & Prof. Code § 17208, while under the CLRA actions must be
 2 commenced “not more than three years from the date of the commission” of the unlawful act,
 3 Cal. Civ. Code § 1783. Similarly, claims founded in quasi-contract, such as unjust enrichment,
 4 are subject to the same statute of limitations as fraud and must therefore be commenced within
 5 three years from the date the cause of action accrued. *First Nationwide Savings v. Perry*, 11 Cal.
 6 App. 4th 1657, 1670 (1992). Therefore, applying elementary math, the claims of the putative
 7 class members who own a home in which a fireplace was installed more than three to four years
 8 ago are time-barred.⁷

9 The Complaint attempts to overcome the untimeliness of these class claims by alleging
 10 that Defendants “concealed” that the glass doors to the fireplace become hot during operation.
 11 (See, e.g., Compl. ¶¶ 1, 15, 22.) The addition of these cursory allegations of concealment,
 12 however, are not sufficient to resurrect the tardy class claims as neither the delayed discovery rule
 13 nor the fraudulent concealment doctrine are applicable, as discussed in detail below.

14 ***1. The Delayed Discovery Rule Does Not Apply to the UCL Claim***

15 The delayed discovery rule provides that a cause of action does not accrue until the
 16 “plaintiff has actual or constructive knowledge of facts giving rise to the claim.” See generally
 17 *Snapp & Assoc. Ins. Servs., Inc. v. Robertson*, 96 Cal. App. 4th 884, 891 (2002). Numerous state
 18 and federal authorities have held that this rule does not apply to UCL claims. See, e.g., *id.*
 19 (holding that the discovery rule “does not apply to unfair competition actions”); *McCready v.*
 20 *American Honda Motor Co., Inc.*, 2006 WL 1708303, * 4 (N.D. Cal. 2006) (same). As a result,
 21 the four-year UCL statute of limitations begins to run “on the date the cause of action accrue[s],
 22 not on the date of discovery.” *Karl Storz Endoscopy Am., Inc. v. Surgical Techs. Inc.*, 285 F.3d
 23 848, 857 (9th Cir. 2002) (citation omitted); *Snapp*, 96 Cal. App. 4th at 891 (explaining that “the
 24 statute begins to run...irrespective of whether plaintiff knew of its accrual”); see also *Endres v.*

25
 26 ⁷ The statute of limitations begins to run as soon as the first owner purchases a home with a fireplace; if this original
 27 owner sells the home, the new owner is not entitled to a new statute of limitations as “[s]uch a rule would wholly
 28 disregard the repose function of statutes of limitations.” See *Camsi IV v. Hunter Technology Corp.*, 230 Cal.App.3d
 1525, 1535 (1991) (stating “[a]n owner must bring its claim to court within the statutory period or the claim will be
 barred for that and all subsequent owners”).

1 *Wells Fargo Bank*, 2008 WL 344204, *6 (N.D. Cal. 2008) (stating that “the UCL limitations
2 period [on a claim alleging misrepresentations] begins to run at the time of the alleged
3 misrepresentation, not on the date of its discovery by the plaintiff”). Accordingly, the discovery
4 rule is of no aid to those class members with untimely UCL claims.

5 **2. *Plaintiffs Have Not and Cannot Allege Sufficient Facts for the Delayed***
6 ***Discovery Rule to Apply to the CLRA or Unjust Enrichment Claims***

7 Unlike the UCL, the discovery rule applies to CLRA claims and quasi-contract claims,
8 causing the statute to run from the time a reasonable person would have discovered the basis for a
9 claim. *Endres*, 2008 WL 344204, at *6 (discovery rule applies to CLRA actions) (citing
10 *Massachusetts Mut. Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1295 (2002)); *cf. E-*
11 *Fab, Inc. v. Accountants, Inc. Services*, 153 Cal. App. 4th 1308, 1318 (2007) (discovery rule
12 applies to fraud actions). Significantly, however, the delayed discovery rule “does not postpone
13 the accrual of a cause of action until a plaintiff *actually* discovers the relevant facts.” *McCready*,
14 2006 WL 1708303, *4 (emphasis in original) (citing *Kline v. Turner*, 87 Cal. App. 4th 1369, 1375
15 (2001)). Rather, the rule provides that a cause of action begins to accrue as soon as a plaintiff has
16 “notice or information of circumstances that would have put a reasonable person on inquiry, or
17 [has] the opportunity to obtain knowledge from sources open to their investigation.” *Id.* (citing
18 *Gen. Bedding Corp. v. Echevarria*, 947 F.2d 1395, 1397 (9th Cir. 1991)).

19 To invoke the delayed discovery rule in a complaint, a plaintiff has “to plead facts
20 showing: (1) lack of knowledge; (2) lack of means of obtaining knowledge; and (3) how and
21 when the fraud or mistake was actually discovered.” *Id.* (citing *Gen. Bedding Corp.*, 947 F.2d at
22 1397). Plaintiffs have not plead any of these essential facts with respect to those class members
23 who had a fireplace installed more than three years ago. For example, Plaintiffs have not pled
24 any facts regarding the purported lack of knowledge of these class members, their ignorance of
25 the alleged fraud, why they lacked the means to discover the alleged fraud, whether they
26 exercised reasonable diligence in investigating the alleged fraud, or when the alleged fraud was
27 actually discovered. As a result, the putative class members have not plead sufficient facts to
28 invoke the discovery rule, and without the assistance of this rule, their claims are time-barred by

1 the CLRA and unjust enrichment three-year statute of limitations.

2 Furthermore, Plaintiffs should not be granted leave to amend their Complaint because they
 3 cannot allege facts that would support application of the discovery rule to the claims of those
 4 class members who own a home in which a fireplace was installed more than three years ago. *See*
 5 *generally Conley*, 355 U.S. at 45. Reasonable persons know that fires are hot. Fireplaces
 6 generate heat. The fact that the glass pane of the fireplaces sits only inches away from the flames
 7 and may become hot during operation is patently obvious thereby placing any reasonable person
 8 on notice. *See Gen. Bedding Corp.*, 947 F.2d at 1397 (explaining that a cause of action begins to
 9 accrue as soon as a plaintiff has “notice or information of circumstances that would have put a
 10 reasonable person on inquiry”). Even if the class members somehow did not understand that the
 11 glass-fronts become hot, they could have easily discovered this information by simply turning on
 12 their fireplaces. *See id.* (explaining that under the delayed discovery rule, a claim begins to
 13 accrue as soon as a plaintiff has “the opportunity to obtain knowledge from sources open to their
 14 investigation”). Thus, Plaintiffs cannot allege that the class members lacked notice or lacked the
 15 means of obtaining knowledge about the temperature of the glass doors, both of which are
 16 essential prerequisites for application of the discovery rule. *See id.*

17 **3. *Plaintiffs Have Not and Cannot Allege Sufficient Facts for the Fraudulent***
 18 ***Concealment Doctrine to Toll the Statute of Limitations***

19 The fraudulent concealment doctrine tolls the statute of limitations when a defendant has
 20 fraudulently concealed the existence of a cause of action. *See Snapp*, 96 Cal. App. 4th at 890
 21 (explaining that doctrine “disarm[s] a defendant who, by his own deception, has caused a claim to
 22 become stale and a plaintiff dilatory”). The doctrine, however, “does not come into play,
 23 whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff...[has]
 24 notice of a potential claim.” *Id.* (quotation marks and citation omitted). Additionally, like the
 25 delayed discovery rule, a plaintiff has “a duty to reasonably investigate” under the fraudulent
 26 concealment doctrine. *Id.* (citing *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1112 (1988)); *see also*
 27 *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 120 (9th Cir. 1980) (indicating that the
 28 plaintiff must exercise “due diligence in trying to uncover the facts”).

1 Under both California and federal authority, a plaintiff must plead facts giving rise to a
2 claim of fraudulent concealment with particularity. *Conerly*, 623 F.2d at 120; *Rutledge v. Boston*
3 *Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978). To properly plead fraudulent
4 concealment, the plaintiff must state: “(1) when the fraud was discovered; (2) the circumstances
5 under which it was discovered; and (3) that the plaintiff was not at fault for failing to discover it
6 or had no actual or presumptive knowledge of facts sufficient to put him on inquiry... [and] that in
7 the exercise of reasonable diligence the facts could not have been discovered at an earlier date.”
8 *Conerly*, 623 F.2d at 120 (citing *Baker v. Beech Aircraft Corp.*, 39 Cal. App. 3d 315, 321 (1974)).
9 Additionally, the “plaintiff must allege facts showing affirmative conduct upon the part of the
10 defendant which would, under the circumstances of the case, lead a reasonable person to believe
11 that he did not have a claim for relief.” *Id.* (citing *Rutledge*, 576 F.2d at 250). “The existence of
12 such fraud must be alleged clearly and unequivocally and must not rest upon inferences.” *Id.*

13 With respect to those class members who own a home in which a fireplace was installed
14 more than three or four years ago, Plaintiffs have failed to allege fraudulent concealment with
15 particularity as required to toll the statute of limitations. For example, Plaintiffs have not plead
16 any facts regarding the purported lack of knowledge of these class members, their ignorance of
17 the alleged fraud, why they lacked the means to discover the alleged fraud, whether they
18 exercised reasonable diligence in investigating the alleged fraud, when the alleged fraud was
19 actually discovered and under what circumstances, and importantly, what affirmative conduct by
20 Defendants would, under the circumstances of this case, lead reasonable persons to believe that
21 they did not have a claim for relief. Given the absence of these essential factual allegations, the
22 Court should dismiss the UCL, CLRA and unjust enrichment claims asserted by the class
23 members who own a home in which a fireplace was installed more than three or four years ago.

24 Additionally, Plaintiffs should not be granted to leave to amend because the fraudulent
25 concealment doctrine only applies when a plaintiff has no actual or presumptive knowledge of
26 facts that would put him on notice, and when in the exercise of reasonable diligence such facts
27 could not have been discovered earlier. *Conerly*, 623 F.2d at 120. Since the class members
28 should appreciate and understand that the fireplace glass-fronts become hot, they had notice, and

1 since the class members have these fireplaces installed in their homes, they did not lack the means
2 to discover this information. Accordingly, since Plaintiffs can allege no facts that would bring the
3 UCL, CLRA and unjust enrichment claims asserted by these class members within the statute of
4 limitations, this Court should dismiss those claims without leave to amend. *See generally Conley*,
5 355 U.S. at 45 (the court may dismiss the complaint without leave to amend if “the plaintiff can
6 prove no set of facts in support of his claim which would entitle him to relief”).

7 VI. CONCLUSION

8 The Complaint should be dismissed on multiple grounds. First, Plaintiffs have failed to
9 plead their UCL, CLRA and unjust enrichment claims with the requisite particularity. Second,
10 Plaintiffs cannot assert an unjust enrichment claim as a matter of law. Third, Plaintiffs have not
11 alleged sufficient facts to demonstrate compliance with the pre-lawsuit notice requirements of the
12 CLRA, and fourth, Plaintiffs have not alleged that Defendants engaged in a “transaction” with an
13 “individual” who purchased the fireplaces for “personal, family, or household purposes,” as
14 required by CLRA. Finally, because the discovery rule and fraudulent concealment doctrines do
15 not apply, the UCL claims asserted by class members who own a home in which a fireplace was
16 installed more than four years ago are barred by the statute of limitations, while the CLRA and
17 unjust enrichment claims asserted by class members who own a home in which a fireplace was
18 installed more than three years ago are barred by the statute of limitations.

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1 For these reasons, the Court should not only dismiss the Complaint, but refuse to grant
2 Plaintiffs leave to amend their CLRA and unjust enrichment claims, as well as the UCL, CLRA
3 and unjust enrichment causes of action that are asserted by class members whose claims are
4 barred by the three or four statute of limitations.

5
6 DATED: June 27, 2008

DOWNEY BRAND LLP

7
8 By: /s/ William R. Warne

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